

APPEAL NO. 010781

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 26, 2001. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplement income benefits (SIBs) for the second quarter from October 21, 2000, through January 19, 2001, and that the respondent (carrier) did not waive its right to contest the claimant's entitlement to SIBs for the second quarter. The claimant has appealed the hearing officer's decision and the carrier urges affirmance.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the claimant is not entitled to SIBs for the second quarter from October 21, 2000, through January 19, 2001. Section 408.142 contains the statutory requirements for entitlement to SIBs. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides that a claimant has made a good faith effort if he or she looked for employment commensurate with his or her ability to work every week of the qualifying period and documented his or her job search efforts. The claimant offered into evidence his Application for [SIBs] (TWCC-52) which listed his job searches for the second quarter. Six weeks of the qualifying period, stipulated as July 9, 2000, through October 7, 2000, showed no job searches.

The claimant testified that he kept a list of his job searches in a notebook at home; however, the notebook was not offered into evidence at the CCH. The claimant attached to his appeal a copy of a notebook which listed job searches from April 18, 2000, through January 8, 2001. Some of these job searches were included on his TWCC-52 and some were not. The claimant noted at the hearing, and again on appeal, that the carrier failed to include the dates of the second quarter and its qualifying period on the TWCC-52, as required by Rule 130.104(b).

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. See Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993, concerning evidence presented for the first time on appeal. Consequently, the list of job searches attached to the appeal but not in evidence will not be considered on appeal. However, even were we to consider the job search information in the notebook, the claimant would still not have documented a search every week of the qualifying period. We find that the evidence sufficiently supports the hearing officer's determination that the claimant did not document a job search for every week of the qualifying period, as evidenced by the TWCC-52.

The hearing officer did not err in determining that the carrier did not waive its right to contest the claimant's entitlement to SIBs for the second quarter. The evidence supports the hearing officer's determination that the carrier timely requested a benefit review conference, as evidenced by the Request for Benefit Review Conference (TWCC-45).

The hearing officer is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. (Section 410.165(a)). It is for the hearing officer, as the finder of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find them so in this case.

The claimant also asserts on appeal that the hearing officer deliberately continued the CCH to favor the carrier. We find that the hearing officer's grant of a continuance to the carrier so that it could obtain the claimant's answers to its interrogatories was not an abuse of discretion.

Finally, the claimant asserts on appeal that he is entitled to SIBs for the third quarter. Entitlement to SIBs for the third quarter was not raised as an issue at the hearing by the either party. The Appeals Panel does not consider issues raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 951196, decided August 28, 1995; Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.

The hearing officer's decision is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. S. Barnes
Appeals Judge